



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2013-0593; FRL- 9925-96-Region-3]

**Approval and Promulgation of Air Quality Implementation Plans;
Virginia- Prevention of Significant Deterioration; Amendment to the Definition of
“Regulated NSR Pollutant” Concerning Condensable Particulate Matter**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve a July 25, 2013 State Implementation Plan (SIP) revision submitted by the Virginia Department of Environmental Quality (VADEQ) for the Commonwealth of Virginia. The revision includes a correction to the definition of “regulated NSR [New Source Review] pollutant” as it relates to condensable particulate matter under Virginia’s Prevention of Significant Deterioration (PSD) program. The revision also includes the correction of a minor typographical error. EPA is approving these revisions to the Virginia SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on **[insert date 60 days after publication in the Federal Register]** without further notice, unless EPA receives adverse written comment by **[insert date 30 days after publication in the Federal Register]**. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2013-

0593 by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.
- B. E-mail: campbell.dave@epa.gov.
- C. Mail: EPA-R03-OAR-2013-0593, David Campbell, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.
- D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2013-0593. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification,

EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 25, 2013, VADEQ submitted a formal revision to the Virginia SIP. The SIP revision consists of an amendment to the definition of “regulated NSR pollutant” for VADEQ’s PSD program under Article 8 of Chapter 80 of the Virginia Administrative Code (VAC), as well as a correction of a minor typographical error. The definition revision pertains to the regulation of particulate matter, specifically, gases that condense to form particles (condensables).

“Particulate matter” (PM) is a term used to define an air pollutant that consists of a mixture of solid particles and liquid droplets found in the ambient air. PM occurs in many sizes and shapes and can be made up of hundreds of different chemicals. As explained further in the discussion that follows, EPA has regulated several size ranges of particles under the CAA, referred to as indicators of particles, namely PM, coarse PM (PM₁₀), and fine PM (PM_{2.5}).

Initially, EPA established a National Ambient Air Quality Standard (NAAQS) for PM on April 30, 1971, under sections 108 and 109 of the CAA. *See* 36 FR 8186. Compliance with the original PM NAAQS was based on the measurement of particles in the ambient air using an indicator of particles measuring up to a nominal size of 25 to 45 micrometers (µm). EPA used the indicator name “total suspended particulate” or “TSP” to define the particle size range that was being measured. Total suspended particulate remained the indicator for the PM NAAQS until 1987 when EPA revised the NAAQS in part by replacing the TSP indicator for both the primary and secondary standards with a new indicator that includes only those particles with an aerodynamic diameter less than or equal to a nominal 10 µm (PM₁₀).

On July 18, 1997, the EPA made significant revisions to the PM NAAQS in several respects. While the EPA determined that the PM NAAQS should continue to focus on PM₁₀, EPA also determined that the fine and coarse fractions of PM₁₀ should be considered separately. Accordingly, on July 18, 1997, the EPA added a new indicator for fine particles with a nominal mean aerodynamic diameter less than or equal to 2.5 µm (PM_{2.5}), and continued to use PM₁₀ as the indicator for purposes of regulating the coarse fraction of PM₁₀. *See* 62 FR 38652.

On May 16, 2008, EPA finalized the “Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})” (2008 NSR PM_{2.5} Rule) to

implement the 1997 PM_{2.5} NAAQS, including changes to the NSR program. *See* 73 FR 28321.

The 2008 NSR PM_{2.5} Rule revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the PM_{2.5} NAAQS in both attainment and nonattainment areas. Among other requirements, the 2008 NSR PM_{2.5} Rule required states and sources to account for condensables in PM_{2.5} emission limits.

The 2008 NSR PM_{2.5} Rule contained an error in the regulations for PSD¹ and in the EPA's Emission Offset Interpretative Ruling.² This error was introduced in the definition of "regulated NSR pollutant" that was revised as part of the final rulemaking. The wording of that revised definition had the effect of requiring that PM emissions, PM₁₀ emissions, and PM_{2.5} emissions - representing three separate size ranges or indicators of particles - must all include condensables. EPA did not intend in the 2008 NSR PM_{2.5} Rule that the term "particulate matter emissions" be listed with "PM_{2.5} emissions" and "PM₁₀ emissions" in requirements to include the condensable fraction of primary PM. Historically, for "particulate matter emissions" often only the filterable fraction had been considered for NSR purposes, consistent with the applicable New Source Performance Standards (NSPS) for PM and the corresponding compliance test method. On October 25, 2012, EPA promulgated a final rule³ which revised the definition of "regulated NSR pollutant" to correct the error and remove the unintended new requirement on state and local agencies and the regulated community that "particulate matter emissions" must include condensables in all cases. EPA's October 25, 2012 action ensured that the originally-intended approach for regulating the three indicators for emissions of particulate matter under the PSD

¹ *See* 40 CFR 51.166 and 52.21.

² *See* 40 CFR part 51, appendix S.

³ *See* 77 FR 65107 (October 25, 2012) ("Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}): Amendment to the Definition of 'Regulated NSR Pollutant' Concerning Condensable Particulate Matter").

program was codified. Thus, “PM₁₀ emissions” and “PM_{2.5} emissions” are regulated as criteria pollutants (that is, under the portion of the definition of “regulated NSR pollutant” that refers to “[a]ny pollutant for which a national ambient air quality standard has been promulgated...” and are required to include the condensable PM fraction emitted by a source. *See* 40 CFR 51.166(b)(49)(i) and 52.21(b)(50)(i). In contrast, “particulate matter emissions” is regulated as a non-criteria pollutant under the portion of the definition that refers to “[a]ny pollutant that is subject to any standard promulgated under section 111 of the Act,” where the condensable PM fraction generally is not required to be included in measurements to determine compliance with standards of performance for PM. *See* 40 CFR 51.166(b)(49)(ii) and 52.21(b)(50)(ii).

Virginia submitted and EPA previously approved a SIP revision to address the provisions of the 2008 PM_{2.5} NSR Rule which included the errant language relating to “particulate matter emissions.” *See* 79 FR 10377 (February 25, 2014). This direct final rulemaking action makes Virginia’s PSD SIP consistent with EPA’s original intent, as well as consistent with the corrected Federal requirements that only PM₁₀ and PM_{2.5} consider condensables, unless a specific NSPS or SIP provision requires otherwise. Additional discussion on EPA’s requirements to consider condensables for PM₁₀ and PM_{2.5} for PSD is available in the preamble to EPA’s October 25, 2012 rulemaking action, which is included in the docket for this action.

EPA notes that on January 4, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in *Natural Resources Defense Council v. EPA*⁴ (hereafter, *NRDC v. EPA*), issued a decision that remanded the EPA’s rules implementing the 1997 PM_{2.5} NAAQS, including the 2008 NSR PM_{2.5} Rule. The D.C. Circuit’s remand of the 2008 NSR PM_{2.5} Rule is relevant to this direct final rulemaking. As previously discussed, this rule promulgated NSR

⁴ *See* 706 F.3d 428 (D.C. Cir. 2013).

requirements for implementation of PM_{2.5} in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). The D.C. Circuit found that EPA erred in implementing the PM_{2.5} NAAQS pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than pursuant to the additional implementation provisions specific to particulate matter nonattainment areas in subpart 4. The court ordered EPA to “repromulgate these rules pursuant to Subpart 4 consistent with this opinion.” *Id.* at 437. However, as the requirements of subpart 4 only pertain to nonattainment areas, it is EPA’s position that the portions of the 2008 NSR PM_{2.5} Rule that address requirements for PM_{2.5} in attainment and unclassifiable areas are not affected by the D.C. Circuit’s opinion in *NRDC v. EPA*. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 NSR PM_{2.5} Rule in order to comply with the court’s decision. Accordingly, EPA’s approval of Virginia’s SIP as to the PSD requirements promulgated by the 2008 NSR PM_{2.5} Rule does not conflict with the D.C. Circuit’s opinion.

II. Summary of SIP Revision

This action amends the previously approved definition of “regulated NSR pollutant” under 9VAC5-80-1615 to be consistent with the Federal definition and requirements for condensable PM. Additionally, 9VAC5-80-1615(B) is revised to correct a minor typographical error (a regulatory citation to an incorrect section of the VAC). The revisions being approved were effective in the Commonwealth of Virginia on May 22, 2013.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by

reference of revisions to the definitions under 9VAC5-80-1615 as described in Section II of this notice. EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or in hard copy at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

IV. Final Action

EPA is approving VADEQ's July 25, 2013 submittal as a revision to the Virginia SIP. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of this Federal Register, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on **[insert date 60 days from date of publication in the Federal Register]** without further notice unless EPA receives adverse comment by **[insert date 30 days from date of publication in the Federal Register]**. If EPA receives adverse comment, EPA will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

V. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code section 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . ." The opinion concludes that "[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval." Virginia's Immunity law, Va. Code Sec. 10.1-1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an

environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country

located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this Federal Register, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking

action.

This action pertaining to Virginia's PSD program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 25, 2015.

William C. Early, Acting
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV—Virginia

2. In § 52.2420, the table in paragraph (c) is amended by revising the entry for Section 5-80-1615 to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-Approved Virginia Regulations and Statutes

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * * *				
9 VAC 5, Chapter 80 Permits for Stationary Sources [Part VIII]				
* * * * *				
Article 8 Permits – Major Stationary Sources and Major Modifications Located in Prevention of Significant Deterioration Areas				
* * * * *				
5-80-1615	Definitions	5/22/13	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	Revised. Limited approval remains in effect.
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[FR Doc. 2015-08417 Filed: 4/10/2015 08:45 am; Publication Date: 4/13/2015]